Supreme Court, U. S.
FILED
APR 8 1978
MICHAEL RODAK, JR., CLERK

No. 77-1160

In the Supreme Court of the United States

OCTOBER TERM, 1977

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME AND ALLIED HEALTH SERVICES UNION, SEIU, AFL-CIO,
PETITIONER

v.

THE LONG ISLAND COLLEGE HOSPITAL and
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1160

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME AND ALLIED HEALTH SERVICES UNION, SEIU, AFL-CIO,
PETITIONER

v.

THE LONG ISLAND COLLEGE HOSPITAL and
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. The National Labor Relations Board ("the Board") found that the Long Island College Hospital ("the Hospital") violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 61 Stat. 140-141, 29 U.S.C. 158(a)(5) and (1) by refusing to bargain with petitioner ("the Union") as the representative of a unit of maintenance and engineering employees. In doing so, the Board extended comity to a decision of the New York State Labor Relations Board ("SLRB") finding such

a unit to be appropriate for collective bargaining (Pet. App. B 19).[1]

In extending comity to the state unit determination, the Board rejected the Hospital's contention that to do so would ignore the legislative history of the "Hospital Amendments" (note 1, *supra*), which admonishes against undue proliferation of bargaining units in health care institutions (Pet. App. B 12 to B 14). The Board found that, although the state statute contained a mandatory craft unit provision,[2] the SLRB did not rely upon or apply that

[1]Pursuant to petitions filed with the SLRB by the Union seeking to represent the Hospital's service and maintenance employees, and by a rival union seeking to represent just the maintenance and engineering employees, the SLRB ruled that a separate unit of maintenance and engineering employees and a combined service and maintenance unit were equally appropriate for collective bargaining. The SLRB accordingly directed an election in which the Hosptial's maintenance and engineering employees were afforded an opportunity to vote on whether they wanted a separate unit, and, if so, whether they desired the Union as their representative. *The Long Island College Hospital*, 27 SLRB 405. The election resulted in the selection of a separate bargaining unit by the maintenance and engineering employees, and a victory for the Union in that unit. When the Hospital refused to bargain on the ground that the unit was inappropriate, the SLRB issued a bargaining order (34 SLRB 324), which was upheld on appeal. *Long Island College Hospital* v. *New York State Labor Relations Board, et al.*, 32 N.Y. 2d 314, 298 N.E. 2d 614, certiorari denied, 415 U.S. 957.

Thereafter, the Hospital entered into negotiations with the Union, but when the NLRA was amended, effective August 25, 1974, to extend its coverage and protection to employees of nonprofit health care institutions, Act of July 26, 1974, 88 Stat. 395, the Hospital refused to bargain further, asserting once again that the unit was inappropriate. The Union then filed an unfair labor practice charge with the Board. (Pet. App. B 9.)

[2]The proviso to Section 705(2) of the New York State Labor Relations Act (McKinney 1977) provides (Pet. App. B 10):

> [T]hat in any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining.

provision here. "Rather, the SLRB weighed the various factors traditionally considered by it (and by the NLRB) in reaching unit determinations, including homogeneity, earnings, interchange and history of collective bargaining, against *its policy* of avoiding 'over-compartmentalization of hospitals into numerous small bargaining units' and found the factors to be evenly balanced" (Pet. App. B 10; emphasis in original). The Board also pointed out that the NLRA, as amended, does not preclude it from finding appropriate a unit limited to maintenance employees (Pet. App. B 13). Finally, the Board found that, contrary to the Hospital's assertions, neither the passage of time, employee turnover, nor changes in the Hospital's operations had rendered the separate unit of maintenance employees inappropriate (Pet. App. B 14 to B 19).

2. The court of appeals, granting the Hospital's petition for review, remanded the case to the Board for further proceedings (Pet. App. A 1 to A 28). It found that the SLRB's conclusion that a single maintenance unit agreed with state policy against over-compartmentalization was based in large part on the fact that, under the state craft provision (note 2, *supra*), these skilled craft employees could have demanded their own bargaining units and thereby forced the SLRB into still further compartmentalization. No such consideration would be present in a Board unit determination, because there is no comparable right under the NLRA. Accordingly, the court concluded that the state law was not sufficiently congruent with federal law to justify application of comity principles. (Pet. App. A 18 to A 21.)[3]

[3]In light of its conclusion that the federal and state laws were incongruent, the court found it unnecessary to reach the issue decided in *Memorial Hospital of Roxborough* v. *National Labor Relations Board*, 545 F. 2d 351 (C.A. 3), *i.e.*, whether Section 9(b) of the NLRA, 29 U.S.C. 159(b), precludes the Board from extending comity to state unit determinations (Pet. App. A 16).

The court remanded the case to the Board to make its own determination of an appropriate bargaining unit based on evidence already adduced before its Administrative Law Judge and such further evidence as it may deem necessary. In view of the fact that the Union was certified 13 years ago and only 8 of the original 55 employees are still unit members, the court further held that, should the Board find a maintenance unit appropriate, it could not rely on the results of the state election but must direct a new election. (Pet. App. A 27 to A 28.)

3. The Board will accord comity to state representation proceedings where the state procedures conform to due process requirements and are consistent with the policies of the NLRA. See, *e.g.*, *Mercy-Memorial Hospital Corp.*, 221 NLRB 1, 2-3, enforcement proceedings pending, C.A. 6, No. 76-2338; *St. Joseph's Hospital*, 221 NLRB 1253, enforced, 542 F. 2d 495 (C.A. 8). The court below did not reach the question whether this policy is valid (cf. *Memorial Hospital of Roxborough* v. *National Labor Relations Board*, 545 F. 2d 351 (C.A. 3)) because it concluded, contrary to the Board, that the State unit determination was influenced by principles of state law inconsistent with the NLRA. Accordingly, the question presented is whether the court below erred in so concluding. While the Board believes that the court erred, it did not file a petition for certiorari because, in its judgment, the decision is limited to the facts of this case and does not reject the Board's comity policy. Should the Union's petition be granted, however, the Board will defend its decision and order.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

APRIL 1978.

DOJ-1978-04